KERAJAAN MALAYSIA

v.

CHU KOK KHING

HIGH COURT MALAYA, ALOR SETAR
SOFIAN ABD RAZAK J
[CIVIL SUIT NO: 21-01-2005]
20 JANUARY 2010

CIVIL PROCEDURE: *Pleadings - Setting aside - Setting aside writ - Defendant raising preliminary objection over validity of writ on grounds of error in teste - Unconditional appearance filed by defendant - Defendant should have filed conditional appearance and then applied to set aside Writ - Objection overruled*

CIVIL PROCEDURE: *Pleadings - Striking out - Delay - Application to strike-out counterclaim filed 5 months after filing of appearance - Whether inordinate delay*

CIVIL PROCEDURE: *Summary judgment - Income Tax - Appeal against - Failure to pay tax due upon service of notice of assessment - Whether court may entertain plea that amount of tax sought is excessive, incorrectly assessed, under appeal or incorrectly increased - Whether triable issues raised in defendant's defence*

CIVIL PROCEDURE: *Writ of summons - Teste - Wrong teste used in Writ - Teste referring to Chief Justice of Malaysia instead of Chief Judge of Malaya - Whether defect fatal - Whether defect curable under O. 1A and 2(3) Rules of the High Court*

REVENUE LAW: *Income Tax - Assessment - Summary judgment - Appeal against - Failure to pay tax due upon service of notice of assessment - Whether court may entertain plea that amount of tax sought is excessive, incorrectly assessed, under appeal or incorrectly increased - Whether triable issues raised in defendant's defence*

Enclosure 5 was an application by the plaintiff pursuant to O. 18 r. 19(1)(a) of the Rules of the High Court, 1980 ('RHC') to strike out the defendant's counterclaim on the grounds that the pleading disclosed no cause of action. Enclosure 6 was the plaintiff's application for leave to enter summary judgment. Essentially, the said application was premised on a taxable income owing and payable for the year of assessment 1999 (Additional), 2000 (Additional), 2002 (Additional) and 2003 (Additional) inclusive of penalty of 10% and 5% respectively pursuant to ss. 103(4) and 103(5A) Income Tax Act, 1967 ("ITA"). The application to strike-

A out was only filed about five months after the filing of the appearance. The plaintiff claimed that the delay in filing the application was because the plaintiff had to gather information from the defendant's record kept at the Investigation Centre, Kuala Lumpur. The defendant claimed that the additional assessment of
B tax was incorrect and without any basis. The learned Senior Assistant Registrar dismissed both the applications with costs. The plaintiff appealed to the judge in chambers against these decisions. The defendant raised a preliminary issue with regard to the validity of the writ and statement of claim because the teste was not in
C accordance with the Registrar's Circular bil 1/2005. The plaintiff submitted that if there was irregularity in the writ and statement of claim, the defendant should have filed a conditional memorandum of appearance.

Held (allowing both the appeals with costs):

D

(1) On the issue of the wrong teste in the writ, it is not fatal to the writ even if the teste is in the name of the Chief Justice of Malaysia and not in the name of the Chief Judge of Malaya. It is curable by virtue of O. 1A and 2(3) of the RHC. It will also not invalidate the writ by virtue of ss. 61 and 71
E respectively of the Interpretation Acts 1948 and 1967. (para 46)

(2) The defendant should have filed a conditional memorandum of appearance to challenge the validity of the writ and thereafter filed an application to set aside the writ. This the defendant
F had not done and it could be inferred that the defendant had submitted himself to the jurisdiction of the court. The objection was therefore overruled. (para 46)

(3) The explanation proffered by the plaintiff on the question of delay in filing the striking out application made sense and was
G quite plausible. The five months delay in filing the said application to strike-out was not an inordinate delay. (paras 48 & 51)

(4) The instant case was based on s. 103(1) of ITA where it related
H to tax payable under assessment on the service of the notice of assessment be due and payable whether or not the defendant appealed against the assessment. Failure by the defendant to pay the tax due entitled the plaintiff to recover by way of civil proceedings as a debt due to the plaintiff. The court will not
I entertain any plea that the amount of tax sought is excessive, incorrectly assessed, under appeal or incorrectly increased under ss. 103(4) or (5) of ITA. There were no merits and triable issues in the defendant's defence. (paras 58 & 59)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bank Bumiputra (M) Bhd & Anor v. Lorrain Esme Osman & Another Case [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 HC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Chen Joon Onn v. Kong Siew Kin [2006] 7 CLJ 1 HC ***(refd)***

Double Acres Sdn Bhd v. Tiarasetia Sdn Bhd [2000] 7 CLJ 550 HC ***(refd)***

Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors [1996] 3 CLJ 695 HC ***(refd)***

Government of Malaysia v. Dato' Mahindar Singh [1995] 1 LNS 323 HC ***(refd)***

Government of Malaysia v. DC [1972] 1 LNS 37 HC ***(refd)***

Huo Heng Oil Co (EM) Sdn Bhd v. Tang Tiew Yong [1984] 1 LNS 45 HC ***(refd)***

Jamir Hassan Najir Hassan v. Kang Min [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 HC ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***

Ngee Tai Shipping Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2007] 6 CLJ 724; CLJ JT(3) HC ***(refd)***

Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York [1998] 1 CLJ 424 CA ***(refd)***

S Manickam & Ors v. Ismail Mohamad & Ors [1996] 1 LNS 117 HC ***(refd)***

Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC ***(refd)***

Ting Hua Yiew v. Ace Commercial Enterprise Sdn Bhd [1996] 1 LNS 64 HC ***(refd)***

Wong Yew Kwan v. Wong Yu Ke & Anor [2010] 2 CLJ 703 CA ***(refd)***

Zakaria Mohamed Esa v. Dato' Abdul Aziz Ahmad & Ors [1984] 1 LNS 92 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 7(1), (2)

Government Proceedings Act 1956, s. 42(2)(e)(i)

Income Tax Act 1967, ss. 99, 103(1), (4), (5A), 106(1), (3), 108(5)

Interpretation Acts 1948 and 1967, ss. 62, 71

Rules of the High Court 1980, O. 1A, O. 2 rr. 1(1), 2(3), O. 2(3), O. 12 r. 7, O. 14, O. 18 r. 19(1)(a), O. 73 r. 4(1)

For the plaintiff - Normareza Mat Rejab SFC

For the defendant - Jagdeep Singh; M/s Karpal Singh & Co

Reported by Amutha Suppayah

A

JUDGMENT

Sofian Abd Razak J:

[1] Enclosures 23 and 24 respectively are the plaintiff's appeals to judge in chambers against the decision of the learned senior
B assistant registrar given on 13 May 2008 dismissing two of the plaintiff's applications with costs in encl. 5 to strike out the defendant's counterclaim and in encl. 6 for leave to enter summary judgment against the defendant for the sum of RM6,705,588.30 together with interest at the rate of 8% per annum from the date
C of judgment till realization and costs.

[2] The court decided to hear both appeals by the plaintiff together as the issues involved are interwoven and closely connected and directed learned counsels for both parties to put in their respective written submissions.
D

[3] On 25 May 2009, the court after perusing the affidavits filed herein and after reading the written submissions by both parties, allowed both the plaintiff's appeal with costs. The defendant who was dissatisfied with the said decision has since filed an appeal.
E

[4] I shall deal first with the appeal in respect of encl. 23 (encl. 5) then followed by encl. 24 (encl. 6) *in seriatim*.

[5] Enclosure 5 is an application by the plaintiff pursuant to O. 18 r. 19(1)(a) of the Rules of the High Court 1980 (hereinafter
F called 'the RHC') to strike out the defendant's counterclaim dated 16 March 2005 on the grounds that the pleading discloses no cause of action.

[6] An application made under O. 18 r. 19(1)(a) RHC states that
G no evidence shall be admissible as the rules do not intend that the contested matter be resolved by way of affidavit evidence.

[7] In order for the plaintiff to succeed for an order under O. 18 r. 19(1)(a) RHC, he must satisfy the court that the defendant's counterclaim is plainly and obviously hopeless and scandalous,
H frivolous or vexation where the claims are unarguable.

[8] The Federal Court in *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 held:

> The principle governing the striking out of pleadings is clear in that it
I is only in plain and obvious cases that recourse should be had to the summary process under Order 18 rule 19 of the Rules of the High Court 1980; the summary procedure under this rule can only be adopted when it can be seen that a claim or answer is on the face of it 'obviously unsustainable'.

[9] In *Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors* [1996] 3 CLJ 695 Mahadev Shanker J stated that the court in determining whether the statement of claim discloses a reasonable cause of action, the state of affairs to which the court must have regard is that which prevailed at the date the action is filed which has to be determined by the pleading itself. No affidavit evidence is admissible (see *S Manickam & Ors v. Ismail Mohamad & Ors* [1996] 1 LNS 117, *Zakaria Mohamed Esa v. Dato' Abdul Aziz Ahmad & Ors* [1984] 1 LNS 92 HC).

[10] The defendant's counterclaim is reproduced in verbatim as follows:

Tuntutan Balas Defendan

10. Defendan mengulangi dan menerimapakai perenggan-perenggan 3-5 dan 8 diatas.

11. Defendan plid bahawa plaintif, Kerajaan Malaysia adalah bertanggungjawab secara vikarius untuk segala tindakan-tindakan, pengingkaran-pengingkaran dan/atau peninggalan-peninggalan, ejen-ejen, pekerja-pekerja dan ataupun pengkhidmat-pengkhidmatnya termasuk Lembaga Hasil Dalam Negeri (kemudian ini dipanggil 'LHDN') dan pegawai-pegawai.

12. Defendan seterusnya plid bahawa beliau telah diserang pukul (assaulted) oleh pihak pasukan LHDN pada 6.4.2004 apabila pasukan tersebut telah menyerbu masuk ke premis syarikat Defendan sepertimana dinyatakan diatas. Defendan plid cara didalam mana pasukan tersebut bertindak telah menyebabkan beliau kejutan serius dan juga telah meningkatkan perasaan dukacita teruk dan teladan.

    Butir-butir yang memberi hak kepada gantirugi teruk dan teladan:

    (a) Pada 6.4.2004 pasukan LHDN yang diketuai Asokumaran tersebut telah menyerbu masuk kedalam premis perniagaan syarikat Defendan tanpa mengemukakan sebarang waran yang sah disisi undang-undang;

    (b) Didalam apa keadaan jua, cara didalam mana pasukan Lembaga Hasil Dalam Negeri tersebut telah bertindak adalah secara ganas dan liar dan mereka telah menggunakan cara-cara ugutan terhadap pihak Defendan dan pekerja-pekerjanya dipremis tersebut;

    (c) Pasukan LHDN tersebut yang adalah ejen Defendan telah menyalahgunakan kuasa mereka dan bertindak secara melulu;

A

(d) Pasukan LHDN tersebut telah mengugut dan memaksa mengisukan cek untuk RM1 juta sepertimana dihuraikan diatas;

(e) Pasukan LHDN tersebut terutamanya Asokumaran tersebut telah bertindak dengan begitu angkuh pada semua masa material;

B

13. Seterusnya Defendan plid bahawa rampasan dokumen tersebut dan/atau keengganan LHDN untuk mengembalikannya adalah salah diisi undang-undang, seakibat mana Defendan telah mengalami kehilangan dan gantirugi.

C

Butir-butir Gantirugi Khas:

(a) Kehilangan seakibat rampasan dokumen yang diperlukan untuk perniagaan Defendan yang menyebabkan Defendan terpaksa mengalami kos yang banyak untuk memperolehi semula maklumat-maklumat didalam dokumen-dokumen tersebut; dan

D

(b) Kehilangan pendapatan seakibat rampasan paspot Defendan tidak dapat pergi keluar negara untuk tujuan perniagaan.

(Jumlah akan dibekalkan)

E

14. Selanjutnya, Defendan plid bahawa pertuduhan beliau di Mahkamah Majistret Kulim sepertimana dinyatakan diperenggan 8(m) diatas adalah satu pendakwaan berniat jahat dan salah disisi undang-undang.

F

Butir-butir Pendakwaan berniat jahat:

(a) Pasukan LHDN tersebut telah pada 6.4.2004 merampas dokumen-dokumen peribadi dan syarikat Defendan.

(b) LHDN telah walaubagaimanapun mengisukan notis bertarikh 6.4.2004 kepada Defendan dibawah seksyen 79 Akta Cukai Pendapatan 1967 (Pindaan) seperti mana dihuraikan diperenggan 8(k) diatas;

G

(c) LHDN telah secara salah dan berniat jahat mengisukan notis tersebut memandangkan mereka sendiri telah merampas dokumen-dokumen yang diperlukan oleh Defendan untuk membalas notis tersebut;

H

(d) Malahan Defendan telah pun menulis beberapa surat atas namanya sendiri dan juga atas nama syarikat perniagaannya yang memohon untuk dibekalkan dengan salinan-salinan dokumen-dokumen tersebut;

I

(e) Namun, walaupun Defendan telah membuat seperti yang dinyatakan diperenggan seperti yang dinyatakan diperenggan (d) diatas, pihak LHDN telah enggan mengembalikan ataupun membekalkan dokumen-dokumen kepada Defendan sehingga tamat tempoh masa yang diperuntukkan tetapi telah menuduh Defendan pula.

15. Defendan juga seterusnya plid bahawa LHDN juga telah menjejaskan reputasi Defendan apabila ia telah secara salah menyiarkan kepada pihak-pihak ketiga kenyataan-kenyataan palsu berkenaan keberhutangan (kononnya) oleh Defendan kepada LHDN, seakibat mana Defendan telah dijatuhi maruahnya dan dijejaskan reputasinya secara serius, untuk mana Defendan berhak menuntut gantirugi.

16. Berdasarkan segala-segala perkara-perkara yang tersebut diatas, Defendan plid bahawa beliau telah mengalami kehilangan dan gantirugi.

17. MAKA, Defendan menutut untuk relif-relif yang berikut:

(a) Gantirugi khas berjumlah RM ... (akan dibekalkan kemudian);

(b) Gantirugi am, termasuk gantirugi teruk dan teladan;

(c) Faedah pada kadar dan untuk masa sepertimana dianggap sesuai dan wajar oleh Mahkamah Yang Mulia;

(d) Kos; dan ...

[11] The plaintiff upon being served with a copy of the statement of defence and counterclaim however, did not file any reply and defence to counterclaim. Instead he had filed an application by way of summons in chambers (encl. 5) to strike-out the defendant's counterclaim pursuant to O. 18 r. 19(1)(a) RHC.

Finding Of The Court

[12] In the instant case the learned counsel for the defendant had raised a preliminary issue with regard to the validity of the writ and statement of claim by the plaintiff. This is because the teste was not in accordance with the Registrar's Circular bil 1/2005 which appears in Mallal's Supreme Practice (2nd edn) which states as follows:

> Though O. 2 r. 8 RHC 1957, as amended, has not been reenacted, the practice in the Forms requires that the writ is expressed to be issued by the Chief Justice in the name and on behalf of, in Malaysia, His Majesty the Yang di-Pertuan Agong and in Singapore, of the President of the Republic of Singapore.

[13] Further in the Malaysian High Court Practice 2001 Desk Edition, Vol. 1 which states as follows:

> 'Forms 2 and 3 in Appendix A contain the description that the writ is expressed to be issued by the Chief Justice, President or Chief Judge as the case may be' in the name of the Yang diPertuan Agong: Courts of Judicature Act 1964.

[14] Learned counsel for the defendant submitted that it was wrong to have used the incorrect *teste* and it is not a mere irregularity which can be cured by O. 1A and O. 2(3) of RHC. The correct teste should state that the writ is issued by YAA Dato' Siti Norma binti Yaakob Chief Judge of Malaya in the name of the Yang diPertuan Agong.

[15] Learned counsel for the plaintiff submitted that if there is any irregularity in the teste it could be cured under O. 1A and O. 2(3) of RHC as it was a mere irregularity only and it will not invalidate the writ and the statement of claim. Further it was submitted that if there was irregularity in the writ and statement of claim, the defendant should have filed a conditional memorandum of appearance under O. 12 r. 7 of the RHC and followed by an application to strike out the writ and statement of claim.

[16] On this preliminary issue, the court is of the view that although the *teste* in the writ dated on 17 February 2005, should have been in the name of YAA Dato' Siti Norma bin Yaakob the Chief Judge of Malaya, in any event it is not wrong to assume that at the material time, YAA Tun Dato Sri Ahmad Fairuz bin Dato' Sheikh Abdul Halim being the Chief Justice of Malaysia can assume the duties of the Chief Judge of Malaya notwithstanding that as at the date of the writ a Chief Judge of Malaya has been appointed. The Malaysian High Court Practice 2001 Desk Edition, Vol. 1 states as follows:

> Order 6.1.4 - Teste
>
> Forms 2 and 3 in Appendix A contain the description that the writ is expressed to be issued by the Chief Justice, President or Chief Judge as the case may be, in the name of the Yang diPertuan Agung: Courts of Judicature Act 1964 (Act 91) s. 7

[17] The court refers to ss. 62 and 71 of the Interpretation Acts 1948 and 1967 ('hereinafter called 'the Act') for guidance as to what the provisions of the law states. In s. 62 of the Act states that:

> Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not

be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead.

[18] Section 71 of the Act states that:

Save as otherwise expressly provided, wherever forms are prescribed slight deviations there from, not affecting the substance or calculated to mislead shall not invalidate them.

[19] Order 2 r. 1(1) of the RHC states:

Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

[20] Section 7(1) of the Courts of Judicature Act 1964 (hereinafter called 'the CJA') states as follows:

All writs ... whatsoever, whether civil or criminal, shall be issued and expressed to be issued by the Chief Justice, President or Chief Judge, as the case may be, in the name of the Yang diPertuan Agong and shall be signed by the Registrar and sealed or stamped with the seal or stamp of the Court issuing or making the same.

[21] Section 7(2) of the CJA states as follows:

All writs ... whether civil or criminal, issued or made by or by the authority of the Court respecting any cause or matter within its jurisdiction shall have full force and effect and may be served or executed anywhere within Malaysia.

[22] In this respect, the court is of the view that there are ample provisions to state that although the Chief Justice of Malaysia had been named in the teste instead of the Chief Judge of Malaya, this does not invalidate the writ and the statement of claim.

[23] The court also agrees with the view of the learned counsel for plaintiff that the defendant should have filed in a conditional memorandum of appearance and then filed an application to strike out the writ and the statement of claim. This the defendant has not done and the defendant cannot now complain that the writ and statement of claim issued was invalid and therefore is assumed to have submitted to the jurisdiction of the court. Hence there is no merit in the said objection and the court overruled it.

[24] The learned counsel for the defendant on the delay in filing the application to strike-out the counterclaim (encl. 5) submitted that the reasons given by the plaintiff is unacceptable. The defendant had filed its memorandum of appearance and statement of defence on 8 March 2005 and 16 March 2005 respectively but the application to strike-out was only filed on 25 August 2005 about five months later. References were made to the cases of *Bank Bumiputra (M) Bhd & Anor v. Lorrain Esme Osman & Another Case* [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 and *Ting Hua Yiew v. Ace Commercial Enterprise Sdn Bhd* [1996] 1 LNS 64.

[25] In this respect, the court agrees with the learned counsel for the plaintiff in that under O. 18 r. 19 of the RHC the said application to strike-out states that the court may at any stage of the proceedings order to be struck-out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that (a) it discloses no reasonable cause of action or defence, as the case may be; or ...

[26] In the case of *Jamir Hassan Najir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773; similar issue was raised over the delayed by the defendant in filing its application to strike-out the plaintiff's claim. The court observed that:

> Before proceeding to consider the merits of the defendant's application under O. 18 of the RHC it would not be inappropriate perhaps to consider the first issue of the delay raised by Mr Tommy Thomas. It is not disputed that the defendant filed the application well after the defence and counterclaim was filed. While it may be true that in an O. 14 application, it must normally be filed be the defence is delivered, however, in an O. 18 r. 19 of the RHC specifically provides 'The Court may at any stage of the proceedings order to be struck out or amended any pleading' (emphasis added). The issue of delay in an O. 18 application was considered by Zakaria Yatim J in *Bank Bumiputra Bhd & Anor v. Lorrain Esme Osman and another action* where at p. 475 the learned judge said:
>
> > The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application, must be refused after the action has been set down for trial.

[27] In the instant case, the application to strike out the counterclaim was filed before the closed of pleadings. In fact in *Chen Joon Onn v. Kong Siew Kin* [2006] 7 CLJ 1 the court went further to state that even if the pleadings were closed and no date

for trial has been set down, an application to strike-out did not constitute an undue delay and was not inconsistent with the discretion vested in the court to consider such an application.

[28] In *Wong Yew Kwan v. Wong Yu Ke & Anor* [2010] 2 CLJ 703 the Court of Appeal held at p. 717 as follows:

> On the allegation of delay in filing the striking out application, (ie, fourteen months after the close of pleadings), the judge was also right in ruling this issue to be devoid of merit as an application under O. 18 r. 19(1) of the Rules could be made at any stage of the proceedings.

[29] Based on the above principle and the explanation given by the plaintiff, the court overruled the defendant's objection on this issue.

[30] The court shall proceed to examine the counterclaim of the defendant and realized that the plaintiff did not file a reply and defence to the counterclaim. Technically, judgment in default on the counterclaim could be entered against the plaintiff. In *Double Acres Sdn Bhd v. Tiarasetia Sdn Bhd* [2000] 7 CLJ 550 at p. 569 the learned judge had this to say namely:

> A counterclaim is in fact a cross-claim (*Permodalan Plantation Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 MLJ 160, 161) A counterclaim is unique. It may set up a cause of action that is accrued after the action was brought up and filed. A defendant who has any claim or who is entitled to any relief or remedy against the plaintiff in respect of practically everything, may, instead of filing a separate action, make a counterclaim in respect of it. But if the plaintiff has already filed a counterclaim against the plaintiff, and obtained judgment against the defendant in the claim and the judgment has since been satisfied, then the defendant is barred from filing a counterclaim (*CSI International Co. Ltd v. Archway Personnel (Middle East) Ltd* [1980] 3 All ER 215. In short, a counterclaim must be added to the defence and that counterclaim must specifically allude to the relief or remedy which the defendant is seeking. Once a defendant has filed a counterclaim against the plaintiff, the defendant may apply for summary judgment (O. 14 r. 5 of the RHC). *The defendant too may apply for judgment in default of a defence to the counterclaim* (O. 18 r. 8 of the RHC)
>
> (Emphasis added)

[31] The learned counsel for the plaintiff however submitted that, in the first place the defendant was wrong in law to file the counterclaim by virtue of O. 73 of the RHC and read together with s. 42(2)(e)(i) of the Government Proceedings Act, 1956. I shall now reproduce O. 73 of the RHC and s. 42(2)(e)(i) of the Government Proceedings Act 1956 for easier reference.

[32] Order 73 r. 4:

> (1) Notwithstanding Order 15 rule 2, and Order 18 rules and 18, a person may not in any proceedings by the Government make any counterclaim or plead a set-off if the proceedings are for the recovery of, or the counterclaim or set-off arises out of a right or claim to repayment in respect of, any taxes, duties or penalties.

[33] Section 42(2)(e)(i):

> (2) Provision shall be made by rules of court with respect to the following matters:
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> (e) for providing:
>
> (i) that a person shall not be entitled to avail himself of any set-off or counterclaim in any proceedings by the Government for the recovery of taxes, duties or penalties, or to avail himself in the proceedings of any other nature by the Government of any set-off or counterclaim arising out of a right or claim to repayment in respect of any taxes, duties or penalties;

[34] Upon a proper perusal of the defendant's counterclaim, it is apparent that the that the plaintiff's claim is beyond dispute that is a claim in respect of taxes due and payable by the defendant and the filing of the counterclaim falls squarely within the ambit of O. 73 r. 4(1) of the RHC and also s. 42(2)(e) of the Government Proceedings Act, 1956. In *Government of Malaysia v. Dato' Mahindar Singh* [1995] 1 LNS 323 the brief facts are as follows:

> The Plaintiff's claim against the Defendant is for the total sum of RM442,349.43 being tax for the years of assessment from 1975 to 1985. Since the Defendant failed to pay the said sum within the time stipulated under sub-ss. (4) and (5A) of s. 103 of the Income Tax Act 1967, The Plaintiff claims a further increase in the amount due and payable by 10% and 5% as provided for in the same subsections. The total amount which the Plaintiff now claims as due and payable by the Defendant is the sum of RM510,913.53. The Plaintiff also claims interest of 8% per annum from the date of judgment to date of realization and costs. The Defendant filed his Defence and Counterclaim which was followed by the Plaintiff's Reply and Defence to Counterclaim.
>
> The Plaintiff then filed an application leave to enter summary judgment under Order 14 of the RHC against the Defendant for the total sum claimed. The Plaintiff there advanced the same argument as the Plaintiff in the instant case in that the relevant notices of assessment for the relevant years had not been returned to the Plaintiff undelivered and therefore by virtue of s. 145(2) of ITA they are deemed to have been received by the Defendant. If the Defendant was dissatisfied with

the assessment the Defendant was given the right of appeal under s. 99 of ITA. However, the Plaintiff contended that by virtue of s. 103(1) of ITA, the assessed tax becomes due and payable as soon as the notice of assessment is served on the Defendant, notwithstanding any appeal against the said assessment. Further, the Plaintiff contended that by virtue of s. 106(3) of the Act, the Court should not entertain any plea that the tax sought to be recovered is excessive or incorrectly assessed under appeal or incorrectly increased under s. 103(4), (5) or (5A) of ITA.

[35] I have no qualms with the arguments by the learned counsel for the plaintiff in the instant case which mirrored on the same arguments as in the *Dato' Mahindar Singh*'s (*supra*) case and would agree with it.

[36] It has always been said that it is only in plain and obvious cases that recourse should be had to the summary process under O. 18 r. 19(1) of the RHC. It can only be adopted when it can clearly be seen that a claim or answer is on the face of it is 'obviously unsustainable.' In this respect the court is not obliged to go on a minute examination of the documents and facts of the case. So long as the pleading disclosed some cause of action or has raised some question fit to be decided by the judge, the mere fact the case is weak and not likely to succeed at the trial is no ground for it to be struck out. It is trite and settled principle of law in the *locus classicus* case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 where Mohamamed Dzaiddin SCJ delivering the judgment of the Supreme Court stated at p. 43 as follows:

Secondly, based on the competing affidavits of the parties, can this court exercise its power under the said order or under its inherent jurisdiction to strike out the same pleadings on the grounds that they are frivolous or vexatious or may prejudice, embarrass or delay the fair trial of the action or that these pleadings are otherwise an abuse of the process of the court under r. 19(1)(b), (c) or (d) of Order 18?

The principles upon which the court acts in exercising its power under any of the four limbs of Order 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Lt v. Wilkinson, Heywood & Clark Lt*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" (see *AG of Duchy of Lancaster v. L & NW Ply Co*). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v. Moloney & Ors*). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken

A on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari materia* with our O. 33 r. 2 of the RHC) (see *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

B

[37] In this regard it is only in plain and obvious cases that recourse should be had to the summary process under this rule. The facts of the instant case can be clearly seen that the defendant's counterclaim against the plaintiff is on the face of it obviously C unsustainable in law and there is no reasonable cause of action against the plaintiff. The upshot is that the defendant's counterclaim is struck-out and the appeal in encl. 23 is allowed with costs.

[38] Enclosure 6 is the plaintiff's application for leave to enter D summary judgment for the sum of RM6,705,588.30 with interest at the rate of 8% per annum from date of judgment till realization and costs. Essentially, the said application is premised on a taxable income owing and payable for the year of assessment 1999 (Additional), 2000 (Additional), 2002 (Additional) and 2003 E (Additional) inclusive of penalty of 10% and 5% respectively pursuant to s. 103(4) and 103(5A) Income Tax Act, 1967.

[39] In the affidavit in support (encl. 7) of encl. 6 affirmed by one Latifah Hanim bte Mohammad Razak who was at the material time the Assistant Director (Assessment), LHDN stated *inter alia* as F follows namely:

(1) The defendant is and was at the commencement of this action is truly and duly indebted to the plaintiff in the sum of RM6,705,588 being tax payable for the year of assessment G 1999 (Additional), 2000 (Additional), 2009 (Additional), 2002 (Additional) and 2003 (Additional), inclusive of the increment income tax payable pursuant to ss. 103(4) and 103(5A) Income Tax Act 1967 (hereinafter called 'ITA') respectively;

(2) The notices of additional assessment for the preceding year of H assessment 1999, 2000, 2001, 2002 and 2003 were sent to the defendant by ordinary post at the defendant's last known address as stipulated in the Income Tax Form B for the year of assessment referred to herein. The said notices were never returned to the plaintiff were deemed to have been received by I the defendant.

(3) Pursuant to s. 99 of ITA if the defendant is aggrieved with assessment of tax with regard to the liability or quantum he must refer the dispute to the Special Commissioners of Income Tax within 30 days after the service of the notice of assessment made under s. 92 herein;

(4) Pursuant to s. 103(1) of ITA it states that *inter alia* the tax payable under an assessment be due and payable whether or not that person makes an appeal against the increased assessment;

(5) Pursuant to s. 106(3) of ITA, in any proceedings under this section the court shall not entertain any plea that the amount sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103(4), (5) or (5A) of ITA.

(6) The failure of the defendant to pay the additional assessment of tax within the stipulated time, had resulted in the imposition of a penalty of 10% and 5% respectively on the said outstanding sum pursuant to ss. 103(4) and 103(5A) of ITA.

(7) The total assessment of tax amount due and owing to the plaintiff by the defendant is the sum of RM6,705,588.30 and the defendant has neglected and wilfully refused to pay the said sum;

(8) A certificate pursuant to s. 142 signed by the director general giving the name and address of the defendant and the amount of tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for that amount;

(9) The delay in filing this application was because the plaintiff had to gather information from the defendant's record kept at the Investigation Centre, Kuala Lumpur at the Government's Complex, Jalan Duta, Kuala Lumpur. The deponent verily believed that the delay was due to an administrative and was not in any way prejudicial to the defendant. Furthermore the deponent verily believed that the delay was not an inordinate delay;

(10) The plaintiff verily believed that there are no merits in the defence and it was an attempt by the defendant to delay the payment of the tax payable due and owing to the plaintiff and therefore pray that encl. 6 be allowed with costs.

[40] The defendant in his affidavit in reply (encl. 9) affirmed on 18 October 2005 had stated *inter alia* as follows:

(1) That the additional assessment of tax for preceding year of assessment 1999, 2000, 2001, 2002 and 2003 is incorrect and without any basis;

(2) That defendant had fully paid the income tax due and owing for the year of assessment 1999, 2000 and 2003;

(3) That the defendant had objected to the notice of assessment through her income tax agent *vide* letter dated 5 July 2004;

(4) That the plaintiff had wilfully refused to furnish to the defendant with the detail particulars of the additional assessment of tax for the preceding years;

(5) That the plaintiff had forcibly pressurized the defendant into issuing a cheque for a sum of RM1 million;

(6) That the defendant had filed an appeal to the Special Commissioners of Income Tax disputing the assessment of income tax levied on him;

(7) That the defendant disputed the amount of income tax due and owing by Syarikat Shigen Technology Sdn Bhd to the plaintiff in the sum of RM6,705,588.30;

(8) That the defendant had been verily advised by his solicitors that there was an inordinate delay in filing this application by the plaintiff;

The Law On O. 14 Application For Summary Judgment

[41] The basic principle applicable is that as stated by Mohamed Azmi SCJ in the *locus classicus* case of *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 when delivering the majority judgment of the Supreme Court, and I find it necessary to quote from his judgment *in extenso*.

> In our view, basic to the application of all those legal propositions is the requirement under Order 14 for the court to be satisfied on the affidavit evidence that the defend has not only raised an issue but also that the said issue is triable. **The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court**. On the treatment of conflict of evidence on affidavit, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Others v. Letchumanan* had this to say at page 217:

> Regard several principles are involved. First, the court hearing an Order 14 application should work within the framework although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent or inherently improbable in itself it may be.
>
> Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decided a case or matter on affidavit evidence.
>
> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with the undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issue of fact or law, the court must go one step further and determined whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue. (emphasis added).

[42] There is no dearth of authorities as to the principles of summary judgment on O. 14 RHC, but for the moment suffices if I also refer to an earlier case of *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 where Hashim Yeop A. Sani SCJ (as he then was) had occasion to express as follows at pp. 183-184:

> What is involved in the present appeal is the other principle considered in European Asian by Goff LJ (as he then was) that is, what happens when a legal issue is raised by the defence in an Order 14 application. In this of Order 14 and not embark on an exercise under Order 33 rule 2 which empowers the court to determine any question or issue arising in a cause or matter whether of fact or law or partly of fact or partly of law before trial of the cause or matter. Order 33 rule 2 is entirely for a different purpose. Secondly, where the issue raised is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed the court should exercise

A its duty under Order 14 as in any other cases and decide on the question of law. **This is so even if the issue of law raised is a difficult one, if the court after considering the argument is satisfied that it is really unarguable then the court should grant summary judgment**. (emphasis added).

B At page 184, it was further held:

The underlying philosophy in the Order 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only apply to cases where there is no reasonable doubt that the
C plaintiff is entitled to judgment. Order 14 is not intended to shout out a defendant.

The jurisdiction should only be exercised in very clear case.

(emphasis added).

D **[43]** The defendant should be allowed to defend where the court is satisfied from the issue raised and whether in the circumstances of the case there ought to be a trial. It is not enough for the defendant to merely deny the amount owed but the defendant must plead any salient and relevant facts which negative the existence of
E the debt or which show that the claim is not maintainable on other grounds. See the case of *Huo Heng Oil Co (EM) Sdn Bhd v. Tang Tiew Yong* [1984] 1 LNS 45.

[44] It was to be noted that at the hearing of the appeal both the
F plaintiff and defendant counsel, in addition to the written submissions filed, have also submitted orally and the court will consider both the oral as well as the written submissions by both parties.

[45] In resisting the plaintiff's summary judgment's application, the
G defendant raised three issues which will be dealt with in *seriatim*.

1) Wrong *teste* in the writ;

2) Delay in filing the summary judgment application;

H 3) There are merits in the defence.

The First Issue

[46] On the issue of the wrong *teste* in the writ, learned counsel for the defendant had advanced the same argument as during the
I hearing of encl. 5 in that the proper *teste* should have been used. At the risk of repetition, I will adopt the same reasoning as I have made on the same issue during the hearing of encl. 5. Suffice for

me to state briefly that it is not fatal to the writ even if the *teste* is in the name of the Chief Justice of Malaysia and not in the name of the Chief Judge of Malaya. It is curable by virtue of O. 1A and 2(3) of the RHC. It will also not invalidate the writ by virtue of ss. 62 and 71 respectively of the Interpretation Acts 1948 and 1967. Furthermore the defendant should have filed a conditional memorandum of appearance to challenge the validity of the writ and thereafter filed an application to set aside the Writ. This the Defendant has not done and it could be inferred that the Defendant has submitted himself to the jurisdiction of the Court. The Court therefore overruled the objection raised on this issue.

Second Issue

[47] On the question of delay in filing the summary application which was about five months from the date the defendant filed its memorandum of appearance. This issue has also been briefly touched by both parties in their respective submissions in respect of encl. 5 but nevertheless the court will deliberate on this issue again.

[48] The learned counsel for the plaintiff submitted that the plaintiff had explained in the affidavit in support of this application as to why there was a delay in filing the same. The reason being that the matter was being investigated by the Investigation Centre at the Government Complex, Jalan Duta, Kuala Lumpur where most of the records were kept whereas the writ and statement of claim was filed by the LHDN, Taiping at the Alor Setar High Court. I am of the view that the explanation proffered by the plaintiff made sense and quite plausible and accepted it.

[49] In *Government of Malaysia v. Dato' Mahindar Singh (supra)* where the facts are in all fours with the facts of the instant case as it is a tax case. The learned judge held that a delay of six months in filing the summary application was not an inordinate delay.

[50] In *Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York* [1998] 1 CLJ 424, the court held that:

> (1) There is no authority for the proposition that a Plaintiff's summons for summary judgment may be defeated solely on the ground of delay in making the application. Such a proposition runs counter to the interests of justice. Delay is not an answer to an application made under O. 14 of the RHC where there are no *bona fide* triable issues.

A (2) Although the primary intention of O. 14 r. 1 of the RHC may be that an application should be made before a defence has been delivered in the ordinary course, yet it is not in all cases compulsory. A Plaintiff is not necessarily too late in making his application under O. 14 r. 1 of the RHC merely because a defence has been delivered.

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[51] Based on the above stated reasons, I find that the five months delay in filing the said application to strike-out is not an inordinate delay and therefore overruled the objection.

Merits Of The Case

C

[52] The learned counsel for the defendant submitted that in the light of the decision in *Ngee Tai Shipping Sdn. Bhd. v. Ketua Pengarah Hasil Dalam Negeri* [2007] 6 CLJ 724; CLJ JT(3), that the tax dispute between the defendant and the plaintiff should be D referred to the Special Commissioners of Income Tax pursuant to Section 99 of the Income Tax Act, 1967.

[53] Learned counsel for the plaintiff on the other hand submitted that the facts in Ngee Tai Shipping Sdn Bhd *(supra)* is distinguishable with the facts in the instant case, and therefore the E decision should not be followed:

> The brief facts of the case is that the applicant company was issued with a requisition in Form S by the respondent pursuant to s. 108(5) of the Income Tax Act, 1967 ('ITA'). The applicant sought to challenge the respondent's decision and, upon the latter's advice and the F authority of *Ketua Pengarah Hasil Dalam Negeri v. Rheem (Far East) Pty Ltd and Malayan United Industries Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor*, applied for an order of *certiorari* to quash the decision. It was not in dispute that the two decisions of the High Court in essence ruled that a requisition, not being an assessment, is not G amenable to tax appeal before the Special Commissioners, and that the proper way to go about it is to apply for judicial review. Those decisions notwithstanding, the learned Judicial Commissioner, on the facts before him, decided, nonetheless, to re-scrutinize the relevant statutory provisions, and consequently resolve for himself the question of whether the applicant ought rightly to proceed by way of *certiorari*, H or by way of a tax appeal to the Special Commissioners.

[54] In the instant case, the plaintiff's claim against the defendant is based on s. 103(1) of ITA where it relates to tax payable under assessment or on the service of the notice of assessment or on the person assessed; be due and payable at the place specified in that I notice, whether or not that defendant appeals against the assessment as the case may be.

[55] Section 106(1) of ITA states that the tax due and payable may be recovered by the plaintiff by civil proceedings as a debt due to the plaintiff.

[56] On this issue, the court would like to refer to the case of *Government of Malaysia v. DC* [1972] 1 LNS 37 which states as follows:

> ... once an assessment is made, Revenue can invoke sections 103 and 106 of 1967 Act, the effect of such sections being that the tax payable under the assessment shall be on the service of the notice of assessment on the person assessed be due and payable, whether or not that person appeals against the assessment and such tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government. Under section 106(3), the court is debarred from entertaining any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4) or (5).

[57] I am of the view that the decision in *Ngee Tai Shipping Sdn Bhd (supra)* (hereinafter called 'the applicant') is based on the requisition issued by the LHDN under s. 108(5) ITA (Form S) in relation to the 'interim dividend'. A tax dispute arose and the Special Commissioners of Income Tax (hereinafter called 'the respondent') informed the applicant's tax's advisor that its technical department had advised that s. 108 of ITA (Form S) is not amenable to Tax Appeal and the proper way to go about is to apply for judicial review. The learned judicial commissioner was right in his decision when he directed the matter be referred to the special commissioners of Income Tax as the tax dispute arose out of s. 108(5) rather than s. 103(1) of ITA.

[58] The facts in the instant case is based on s. 103(1) of ITA where it relates to tax payable under assessment on the service of the notice of assessment be due and payable whether or not the defendant appeals against the assessment. Failure by the defendant to pay the tax due entitles the plaintiff to recover by way of civil proceedings as a debt due to the plaintiff. The court will not entertain any plea that the amount of tax sought is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103(4) or (5) of ITA.

[59] The court is of the view that the decision in *Ngee Tai Shipping Sdn Bhd (supra)* is distinguishable on the facts with that of the facts in the instant case and therefore does not apply. Based on the decision in *Dato' Mahindar Singh (supra)*, the court finds that there are no merits and triable issues in the defendant's defence.

A

Conclusion

[60] For the reasons as adumberated above, the court hereby allowed the plaintiff's appeals in encl. 23 and encl. 24 with costs.

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